

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

February 22, 2006 Session

IN THE MATTER OF D.P.M., S.H., & Y.M.P.

Appeal from the Juvenile Court for Macon County
No. 02-150049 Ken Witcher, Judge

No. M2005-02183-COA-R3-PT - Filed on September 8, 2006

The Department of Children's Services petitioned the juvenile court to terminate the parental rights of an illegal immigrant mother to three of her children on multiple grounds. After a hearing, the court granted the petition. We have carefully read the record, and we believe the Department failed to prove by clear and convincing evidence that it was in the best interest of the children that their mother's parental rights be terminated. We accordingly reverse.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court
Reversed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

William Joseph Butler, Lafayette, Tennessee, for the appellant, T.M.

Paul G. Summers, Attorney General and Reporter, Elizabeth C. Driver, Assistant Attorney General, Douglas Earl Dimond, Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

OPINION

I. DEPENDENCY AND NEGLECT PROCEEDINGS

On February 8, 2002, the Department of Children's Services ("DCS") filed a Petition in the Juvenile Court of Macon County for temporary custody of the two children of T.M. ("Mother"), a Mexican national. The petition stated that two days earlier, nine-year old D.P.M. (born 1/6/1993) had been brought to the Lafayette Police Department and was observed to have two black eyes and a knot on her head. The child stated that her mother had hit her in the face and head with a frying pan, that verbal and physical abuse by Mother was ongoing, and that she was often left alone with S.H., (born 1/16/2000) her two-year old brother, for extended periods of time.

The court granted DCS a protective custody order on the same day and appointed a guardian ad litem for the children. D.P.M. and S.H. were placed in foster care with friends of the family who lived in the same rural area of Macon County as Mother. The children remained with the couple from that time forward, except for a brief interval in January of 2005, when D.P.M. was sent to stay with her father for a brief (and unsuccessful) trial home visit. Her father, also a Mexican national, lived in Macon County at the time.

On December 11, 2002, the court conducted an adjudicatory hearing at which it found D.P.M. and S.H. to be neglected and dependent children within the meaning of the law. The order memorializing the above finding was not filed until May 29, 2003. It declared that the court found clear and convincing evidence that the mother had committed severe child abuse, and that O.H., the father of S.H., had knowingly failed to protect the children from the mother's abuse (D.P.M. had been born in Mexico to a different father).

The court stated that the mother “. . . did in fact, strike [D.P.M.] in the head to cause noticeable bruising to her face and black eyes, which physical abuse could cause serious physical and/or bodily injury.” The court also found that the mother had committed ongoing physical abuse and that she had an uncontrollable temper, which led to the abuse.

Mother filed an appeal of the Juvenile Court's Order to the Circuit Court. She subsequently dismissed the appeal. Her counsel now suggests that the dismissal amounted to a gesture on the Mother's part to show that she wanted to cooperate with the DCS in every way, in order to improve the chance of reuniting her family. However, by abandoning the appeal, the Mother allowed the Juvenile Court's order to become final, rendering her unable to contest the finding of severe abuse in the subsequent termination proceedings.

DCS prepared a series of permanency plans which listed as dual goals “return to parent” and adoption.¹ An interpreter read the plans to Mother in Spanish, explained them, and Mother signed them. They included requirements that Mother complete parenting classes and anger management classes, that she maintain employment, and that she provide suitable housing for the children. The Department's case workers attempted to help Mother with these goals, but her situation created some difficulties. Mother does not speak English (her daughter, D.P.M., is a fluent English speaker), and since Mother is in this country illegally she does not qualify for public assistance.

Mother attended and completed the parenting and anger management courses that DCS provided. A major emphasis of both these programs was to teach alternative forms of discipline from spankings and other physical punishment.

DCS found interpreters to assist its case workers during supervised visitation between Mother and her children. Mother faithfully attended the arranged visitations, which were initially conducted

¹While the three permanency plans in the record list these dual goals, the State suggests that the earliest plan DCS prepared (which is not in the record) may not have included the goal of adoption.

in a McDonald's and in other restaurants. During those visitations, Mother would bring small gifts of money, clothes and toys to the children, and would pay for their food. The visits were later moved to the offices of DCS in Lafayette, in part because S.H. was overly loud and would misbehave in the restaurant and Mother could not control him.²

Mother and D.P.M. had been seeing a therapist, Dr. Myrna Kemp, to help with family issues. At their last session together, Dr. Kemp determined that Mother needed to see a therapist who spoke Spanish and who understood Mother's culture. After a considerable amount of searching, the Department was able to find a bilingual psychological counselor in Nashville, Dr. Franklin Calderon, who is an experienced psychotherapist and who serves as a mental health provider for the State of Tennessee.

Dr. Calderon saw Mother fifteen times, for an hour or more each time, in the course of counseling her. He also saw D.P.M. at least seven times, sometimes alone and sometimes with Mother. S.H. was apparently also present at some of these sessions. DCS provided transportation for Mother to attend some of the sessions with Dr. Calderon, and Mother provided her own transportation for some sessions. There is no evidence that she ever missed a scheduled session.

The provision of suitable housing was an especially difficult issue both for Mother and for DCS. Mother lived in a trailer park that the Macon County Sheriff's Department considered to be in a dangerous area. A DCS caseworker testified that she had never done a home study on Mother's residence because she did not think it was safe to venture into Mother's neighborhood unescorted. Mother told DCS that she had only \$250 available for monthly rent, but she later modified that to \$300.³ Because of her immigration status she was not eligible for public housing, and DCS did not believe that suitable housing could be procured for so little money.

II. TERMINATION PROCEEDINGS

On May 8, 2003, DCS filed a petition in the Juvenile Court to terminate the parental rights of Mother and of the fathers of D.P.M. and S.H. On September 12, 2003, Mother gave birth to another child, Y.M. The child was taken into DCS custody three days after she was born. On March 18, 2005, DCS filed an amended petition to terminate parental rights, adding Y.M.'s name to the pleading. The termination hearing was conducted over three days in May and June of 2005.

² A case worker testified that Mother seemed to smile when S.H. acted up at McDonald's, and the State contends that her apparent amusement shows that she didn't have a serious attitude about the need for discipline. Mother's attorney suggests that Mother was probably reacting to the failure of discipline that was merely verbal. DCS policies forbid spanking and all other forms of physical discipline by parents and foster parents.

³ Mother was also sending some of her earnings to Mexico to build a house for herself and her mother.

On the first hearing day, the court heard evidence regarding the termination of the fathers' parental rights.⁴ The trial court found that grounds for the termination of the fathers' rights had been proven and that termination was in the best interest of the children. Since this appeal does not involve the fathers, no further discussion of these proceedings is needed.

Several days later, the hearing continued, and DCS presented its evidence on the petition to terminate Mother's rights. The first witness was Dr. Myrna Kemp, who had recently obtained her Ph.D. in counseling psychology. The therapist testified that she had counseled D.P.M. shortly after she came into foster care, usually seeing her every week or every other week. She began counseling S.H. about three or four months before the termination hearing.

Dr. Kemp testified that the type of abuse and neglect D.P.M. had experienced could lead to serious psychological and emotional problems in the future and that, as a girl with poor self-esteem, D.P.M. was at high risk of dropping out of school and becoming sexually active and pregnant at a very young age. While Dr. Kemp had not seen S.H. nearly as much as D.P.M., she noted that he was an angry child who always wanted his own way and tried to be the center of attention.

Dr. Kemp confirmed that Mother had completed parenting and anger management classes, but testified that such classes were unlikely to bring about lasting change unless Mother wanted to change wholeheartedly for the right reasons, and not just to satisfy DCS. On cross-examination, Dr. Kemp acknowledged that she herself had taught the classes in question, that Mother had been fully compliant and had participated in all counseling sessions, and that she had been proactive, coming up with creative ways to see that her children were educated.⁵

Dr. Kemp testified that in her opinion it would be in the best interest of the children for the Mother's parental rights to be terminated and for them to be adopted into a loving and stable home. However, she also affirmed the importance to D.P.M. of her relationship with her mother and stated that the biological bond is almost impossible to break. She acknowledged that the child had told her during several recent sessions that she wanted to return to her mother, but that a few months earlier, she had said she did not want to. The therapist also said that it was important for D.P.M. to maintain a connection to her Hispanic heritage, and she observed that bilingual children usually do very well in school.

When she was asked whether it would be beneficial for the children to maintain a relationship with their mother while in foster care, Dr. Kemp responded, "[t]o continue on as foster children, yes, and if they want to see their mother then I don't have a problem with that as long as it's supervised visitation. They both deserve to know their mom." She then went on to say that the ideal situation for the children would be a permanent placement or adoption. She acknowledged, however, that she

⁴Only a few days prior to May 24, the Mother gave birth by cesarean section to her fourth child. Although she appeared in court on that first hearing date, the attorneys agreed that she was not in any condition to testify, and the court decided to focus solely on the parental rights of the fathers.

⁵Dr. Kemp testified that Mother brought an interpreter with her for every session of class and counseling.

had not formed an opinion as to whether permanent placement with the foster parents would be appropriate.⁵ She was not asked whether the ideal situation she had described would be a likely outcome if Mother's parental rights were terminated.

The foster mother was called to the stand, primarily to testify as to a joint and very contentious counseling session she had attended in Nashville with Mother, D.P.M., and Dr. Cardona. During that session, Mother angrily accused D.P.M. of lying about having been hit with a frying pan and of being the cause of all her problems with DCS. D.P.M. had cried and remained upset during the long ride back from Nashville to Lafayette.

Four employees of DCS then testified. Three of them were case managers who had been assigned in succession to work with Mother and her children. The fourth was a social worker who specialized in adoptions, but who had no involvement with these children.

The case managers had all been present during supervised visitations at McDonald's with Mother, the children, and an interpreter. They all testified that they found Mother's conduct during visitation to be unsatisfactory, in large part because she didn't pay enough attention to the children and did not discipline them appropriately. One disturbing incident was reported by the first case manager, Virginia Burch. She testified that D.P.M. told her that Mother had brought a sixteen year-old boy to meet her, and allegedly suggested that he should be D.P.M.'s boyfriend and that when she turned twelve she should run away and marry him.

Ashley Bradford, the second case manager, also reported an incident during a visit in which the case manager had been reiterating to Mother that she had still not made any kind of admission or taken responsibility for the severe abuse of D.P.M. The child was in the McDonald's play area at the time. According to Ms. Bradford, Mother became agitated, the caseworker called D.P.M. over to them, and Mother started talking angrily to the child. The interpreter told Ms. Bradford that Mother was yelling at D.P.M. that she should tell the truth and quit lying.

All three case managers testified that they believed Mother's parental rights should be terminated, citing her inability to control her anger and her refusal to admit to hitting D.P.M. with the frying pan.⁶

⁵The foster mother testified that she had separated from her husband and been reunited with him two or three times in the course of their marriage, and that on one occasion she had brought and then dismissed a charge of aggravated assault against him. This apparent instability may have placed the advisability of the children's adoption by the foster parents in doubt.

⁶This court has previously expressed its concern over a requirement that a parent admit to alleged abuse or face termination. *State v. R.S. and K.S.*, No. M2002-00919-COA-R3-CV, 2003 WL 22098035, at *15-16 (Tenn. Ct. App. Sept. 11, 2003)(no Tenn. R. App. P. 11 application filed). Any such requirement that may have existed in this case, however, was not used in any of the grounds at issue.

At the conclusion of the State's case, Mother's attorney offered the deposition of Dr. Cardona into evidence as an exhibit to her proof, which was entered into evidence without objection. The hearing was continued for several weeks so the court could hear Mother's testimony.

When the hearing reconvened, Mother's testimony indicated she had worked in a Macon County sewing factory for close to two years. Her job required forty hours of work a week, with occasional overtime. She earned \$6.50 per hour.

Under questioning, Mother stated, "I don't believe my rights should be terminated because I feel like I have complied with everything the state has asked me. I've been up and down trying to take care of whatever they ask me...I really don't know what to do. I have suffered a lot since they have removed my children from me. I really want my children back. Now that I have found me a good man I feel like we can provide for them."

At the time DCS petitioned for custody, Mother was living in a house trailer with O.H., the father of S.H. and Y.M. However, she had since met a man named Tomas Pachero when she was two months pregnant with Y.M. At some later point, O.H. moved out and Mr. Pachero moved in. Mother subsequently became pregnant with a child by Mr. Pachero, and that child was born just before the termination hearing. Mother testified that Mr. Pachero had never had any problems with his temper or with violence.

Tomas Pachero testified that he is a few years younger than Mother. He is also from Mexico. When he first came to this country, he worked in construction. Now he works at a sawmill in Red Boiling Springs. He testified that he and Mother had bought a large trailer together just two weeks before the hearing, paying \$5,000 for it. The trailer only has two bedrooms, but he planned to partition the living room to create a third bedroom. Photographs of the exterior of the trailer were entered into evidence. Because of the short time frame, DCS did not have the chance to come out and inspect the trailer.

In his deposition Dr. Cardona testified that DCS had referred Mother to him for depression and anxiety relating to her children being taken away. The proof showed that DCS had actually intended Dr. Cardona to counsel Mother on domestic violence as a perpetrator. Because of some kind of miscommunication, this form of therapy was never conducted.⁷

In any case, Mother told the therapist that her children were taken from her because of some bruises her daughter suffered. Dr. Cardona asked how the bruises occurred, and Mother told him the child had struck herself on a doorknob. Asked if she had ever administered physical discipline to D.P.M., Mother admitted to hitting her with a slipper or spanking her because she was misbehaving.

⁷The deposition was temporarily adjourned after an hour and a half because of a scheduling conflict, with plans to resume on another day. For reasons not appearing in the record, it was never resumed.

The therapist testified that D.P.M. confirmed that Mother had spanked her, but the child had never complained to him of physical or sexual abuse perpetrated on her by Mother. She did say that her stepfather, O.H., was physically abusive to Mother when he drank. Dr. Cardona had prepared a psychological evaluation of D.P.M., which was made an exhibit to his deposition. The therapist found her to be a bright, energetic, and sensitive bilingual child who wants to be close to her siblings and mother.

Dr. Cardona testified that after interviewing D.P.M. and using various psychological tools to have her describe her thoughts and feelings, "...it became very clear to me that she wanted to be restored to her family, to her mother [and her siblings] and to have the family together." He also interviewed Mother and D.P.M. together, and based both on their statements and on his observations of their facial expressions and body language, he concluded that "they really care for each other and they want to be together." The therapist was also asked whether "within a reasonable degree of professional certainty it's in [D.P.M.'s] best interest to ultimately be reunited with her mother." He answered in the affirmative. Dr. Cardona's written evaluation of D.P.M. concluded with two recommendations: (1) to continue individual and family therapy, and (2) to continue case management for family reunification purposes.

When the guardian ad litem was invited to give a closing statement, he noted that in his numerous conversations with D.P.M. over the past three years:

[s]he hasn't always been consistent in what she told me. Sometimes she wants to live with her dad; sometimes she wants to live with her mom; sometimes she wants to stay in foster care and be adopted; sometimes she wants to go back to Mexico; and sometimes she wants to stay in America. One thing she hasn't deviated from the entire duration of these proceedings is that she loves her mom. And that I have to pay attention to. What the court is here to make a decision on today, is it the right thing to do to terminate the parent/child relationship between [Mother] and her children?

The guardian further noted the enduring importance of family to D.P.M., including her bond with her siblings. He concluded,

Termination is a big step. The oldest of the children wants to maintain the integrity, what is left, of her family. And I have to render an opinion to Your Honor predicated upon what I believe to be in the best interest of the long term stability and benefit to these children. With that in mind, I do not at the present time support the state's petition to terminate [Mother's] parental rights.

The trial court declared that he would follow the statutory requirements and state his findings with regard to each point, which he then proceeded to do.

The court's ruling was memorialized in its Final Decree of Guardianship.⁸ The Decree terminated the parental rights of Mother as well as of the two fathers. In its detailed findings of fact, the court found that DCS had made reasonable efforts to assist the parents, but that despite DCS's efforts the parents failed to do what retention of their parental rights required. We need not recite the court's detailed findings as to the actions (or inaction) of the fathers of the children, since they have not appealed the judgment.

As to Mother, the court found that the following grounds had been proven by clear and convincing evidence: abandonment by reason of failure to support the children, abandonment by failure to establish a suitable home for them, failure to remedy persistent conditions, and the commission of severe child abuse.

The court found that Mother had complied with the requirements of the permanency plan, but that while she "... has gone through the motions, she had not made the necessary changes. She has gone to classes, they just haven't worked . . ." The court went on to recite incidents where Mother yelled at D.P.M. during counseling and visitation, and the disturbing incident with the sixteen year-old boy. The court went on to say that "All of these things show to the Court that [Mother] even though she has gone through the motions of attending counseling that she has not taken it seriously. She has simply done this for the purpose of satisfying the State without an attempt to correct her behavior and learn how to properly parent a child or to not abuse a child."⁹

After the trial court filed the Final Decree of Guardianship, the Mother filed a motion in the trial court to stay its order pending this appeal. The guardian ad litem filed a response in support of the Mother's motion. The trial court denied the motion, and Mother subsequently filed a Tenn. R. App. P. 7 motion in this court to review that denial, contending that if she was not permitted to continue supervised visitation her bond with the children would be irreparably damaged. In light of the potential damage to the parent-child bond if visitation was stopped, the guardian ad litem's support of visitation, and the Department's failure to demonstrate that supervised visitation would harm the children, we granted her motion.

III. STANDARDS FOR TERMINATION OF PARENTAL RIGHTS

Terminating parental rights has the legal effect of "severing forever all legal rights and obligations of the parent or guardian of the child against whom the order of termination is entered and of the child who is the subject of the petition to that parent or guardian." Tennessee Code Annotated § 36-1-113(l)(1). A decree terminating a parent's rights "obliterates the parent-child relationship and, in the eyes of the law, relegates a biological parent to the role of a complete stranger to his or her child...." *In re S.M.*, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004). "Few consequences

⁸ Although the court ruled from the bench on June 14, 2005, its Final Decree of Guardianship was not filed until September 19, 2005.

⁹ Interestingly, while the trial court mentioned Dr. Kemp in its ruling from the bench, there was no mention of the deposition testimony of Dr. Cardona either in the oral ruling or in the Final Decree of Guardianship.

of judicial action are so grave as the severance of natural family ties." *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 787 (1982)).

Under both the United States and Tennessee Constitutions, a parent has a fundamental right to the care, custody, and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212-13 (1972); *In re Swanson*, 2 S.W.2d 3d 180, 187 (Tenn. 1999); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174-75 (Tenn. 1996); *In Re Adoption of a Female Child*, 896 S.W.2d 546, 547-48 (Tenn. 1995); *Nale v. Robertson*, 871 S.W.2d 674, 678 (Tenn. 1994). However, this right is not absolute, for the state may interfere with parental rights when there is a compelling state interest. *Santosky v. Kramer*, 455 U.S. 745, 747, 102 S.Ct. 1388, 1391 (1982); *Nash-Putnam*, 921 S.W.2d at 174-75.

Our legislature has defined those situations in which the state's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth grounds on which termination proceedings can be brought and the other requirements for termination. Tenn.Code Ann. § 36-1-113(g). Parental rights may be terminated only in those statutorily defined circumstances. *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004) (holding that the statutes on termination of parental rights provide the only authority for a court to terminate a parent's rights); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App.1998).

A court may terminate a person's parental rights only if the party seeking termination proves by clear and convincing evidence (1) the existence of at least one statutory ground and (2) that termination of the parent's rights is in the best interest of the child. Tenn. Code Ann. § 36-6-113(c); *In re F.R.R., III*, 193 S.W.3d 528 (Tenn. 2006); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). Thus, parental rights may be terminated only where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-113(c)(1); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). To support the termination of parental rights, only one ground need be proved, so long as it is proved by clear and convincing evidence. *In the Matter of D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003).

However, proof of grounds by clear and convincing evidence is not sufficient, in and of itself, to support the termination of a parent's rights, because the statutes also require proof that termination is in the child's best interests. The existence of a ground does not inexorably lead to that conclusion. *In re Audrey S. & Victoria L.*, 182 S.W.3d 838, 876 (Tenn. Ct. App. 2005); *White v. Moody*, 171 S.W.3d 187 (Tenn. Ct. App. 2004). To conclude otherwise would render meaningless the statutory requirement that both grounds and best interest be proved.

Individualized decision-making in termination cases is constitutionally required. *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999). Each situation is different, and the constitutional rights at stake require that the court evaluate each situation in a fact-specific inquiry, both as to grounds and best interest.

Because the decision to terminate parental rights affects fundamental constitutional rights, courts must apply a higher standard of proof when adjudicating termination cases. *Santosky*, 455 U.S. at 769, 102 S.Ct. at 1403; *In re M.W.A.*, 980 S.W.2d at 622; *O'Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995). To justify the termination of parental rights, both the grounds for termination and the best interest of the child requirements must be established by clear and convincing evidence. Tenn. Code. Ann. § 36-1-113(c)(1) and (c)(2); *In re Valentine*, 79 S.W.3d at 546. “This heightened standard . . . serves to prevent the unwarranted termination or interference with the biological parents' rights to their children.” *In re M.W.A.*, 980 S.W.2d at 622.¹⁰

The “clear and convincing evidence” standard is more exacting than the “preponderance of the evidence” standard. *O'Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995); *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn. Ct. App. 1992). In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is highly probable as opposed to merely more probable than not. *Teter v. Republic Parking System, Inc.*, 181 S.W.3d 330, 341 (Tenn. 2005); *Lettner v. Plummer*, 559 S.W.2d 785, 787 (Tenn. 1997); *In re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000); see also *Estate of Acuff v. O'Linger*, 56 S.W.3d 527, 537 (Tenn. Ct. App. 2001).

In order to be clear and convincing, the evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. *Teter*, 181 S.W.3d at 341; *In re Valentine*, 79 S.W.3d at 546; *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n. 3 (Tenn. 1992). Such evidence should produce in the fact-finder's mind a firm belief or conviction as to the truth of the allegations sought to be established. *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); *In re C.W.W.*, 37 S.W.3d at 474.

IV. GROUNDS

The court found that four statutory grounds for termination of Mother's parental rights had been proven by clear and convincing evidence: abandonment by reason of failure to support the children, abandonment by failure to establish a suitable home for them, failure to remedy persistent conditions, and a prior adjudication of severe child abuse. We will briefly address each.

¹⁰ Different standards of proof are required in certain cases which reflect an allocation of the risk of an erroneous decision and “instruct the factfinder as to the degree of confidence society expects for a particular decision.” *Teter*, 181 S.W.3d at 341, quoting *Estate of Acuff v. O'Linger*, 56 S.W.3d 527, 537 (Tenn. Ct. App. 2001). “*Addington* [v. *Texas*], 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)] teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.” *Santosky*, 455 U.S. at 1395, 102 S.Ct. at 754-55. The Tennessee General Assembly has imposed the clear and convincing evidence standard in termination of parental rights cases. *Teter*, 181 S.W.3d at 341.

A. Abandonment

Abandonment is one of the grounds set out in Tenn. Code Ann. § 36-1-113(g) for termination of parental rights. Parental conduct that constitutes abandonment is defined in Tenn. Code Ann. § 36-1-102 and includes several different possible scenarios. One such scenario is a parent's failure to support a child for the four consecutive months immediately preceding the filing of a petition for termination of parental rights. Tenn. Code Ann. § 36-1-102(A)(1)(i). The trial court found that this ground had been proven as to Mother. However, the State has declared that it does not wish to pursue the ground of failure to support on appeal, so we need not review the trial court's ruling on that ground.

Another definition of abandonment described in the statute is when a child has been removed from the parental home as the result of a finding of dependency and neglect, and,

for a period of four (4) months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date.

Tenn. Code Ann. § 36-1-102(A)(1)(ii).

The proof shows that housing deemed suitable by DCS was a persistent problem for Mother after the children were removed from her custody. By the time of the hearing, she had purchased a trailer with Tomas Pachero, but DCS had not had the opportunity to determine if it would be safe and suitable for the children to reside there.

At the time the children were removed from her custody, Mother was living with O.H. The chief objection to that residence on the part of DCS was that it was located in an area that was considered dangerous. An Affidavit of Reasonable Efforts, prepared by Case Manager Amy Burchett recited that DCS attempted to assist Mother with housing by providing her with the names and phone numbers of real estate agents and a list of apartments in the area and stated that the case manager had made phone calls on at least ten houses and apartments on Mother's behalf. A problem to both Mother and DCS was that Mother was not qualified to receive governmental housing assistance.

Mother testified that she had looked for a place to move to, but that she could find none that was suitable for the rent she was prepared to pay. Of several that she found, she testified that "I was just about ready to rent them and Amy said they didn't qualify because they just had two bedrooms."

Based on the record before us, we cannot conclude that DCS proved by clear and convincing evidence that Mother had not made reasonable efforts to provide a suitable home. The statute

requires reasonable efforts on the part of the parent, not successful results. Additionally, the statute requires that the parent also have demonstrated a lack of concern for the children. Based on the other efforts Mother undertook, including counseling and visitation, we cannot find there was clear and convincing evidence of such lack of concern. Accordingly, we find that DCS failed to prove, by the requisite evidentiary standard, that Mother abandoned her children as that ground is defined under Tenn. Code Ann. § 36-1-102(A)(1)(ii).

B. Persistence of Conditions

The trial court also found that other statutory grounds for termination to had been established, including the ground commonly called persistence of conditions. That ground is defined in Tenn. Code Ann. § 36-1-113(g)(3)(A) as follows:

(3)(A)The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(i) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

The record shows that Mother made sustained efforts to comply with the requirements set by DCS in order to maintain her relationship with her children. Responsibilities placed on a parent by a permanency plan are, and must be, related to and designed to correct the conditions that require foster care. Tenn. Code Ann. § 36-2-403(a)(2)(C); *In re Valentine*, 79 S.W.3d at 547. Although the trial court found that Mother had for the most part complied with the requirements of the various permanency plans prepared by DCS, *i.e.*, had “substantially complied,” it also found that she had only gone through the motions. Consequently, the court found, the children could not safely be returned to Mother’s care.

The trial court’s conclusion was based in part on its fear that Mother had not learned to control her anger and, therefore, the children were subject to further possible abuse. The court found that Mother “has emotional problems and anger management problems that would be detrimental to the children if they were returned to her.” The proof showed that after the children were removed from her custody, Mother would sometimes lose her temper during supervised visitation and yell at them, but there was no testimony that she tried to hit them or that she handled them roughly. Dr. Cardona, who counseled with Mother on a regular basis, testified that Mother had in fact learned that anger and physical discipline can have negative consequences. We find that the evidence that

Mother continued to pose a threat of physical abuse to the children did not reach the level of clear and convincing.

With regard to other conditions, despite Mother's efforts, she still could not demonstrate that she had established the minimal conditions that would enable her children to be safely returned to her, in part because she did not yet have adequate housing for them. If such conditions by their nature can be considered as harbingers of abuse or neglect, the statute requires us to ask whether "these conditions will be remedied at an early date." The proof showed that Mother and Tomas Pachero recently purchased a large trailer with the intention of using it as a home for the entire family. Photographs of the trailer were admitted into the record, but DCS had not had time to do a home study to determine if it could constitute suitable housing. Thus, we cannot say at this stage that there is clear and convincing evidence that the conditions regarding housing children could not be remedied in a relatively short time. We therefore conclude that DCS has failed to establish persistence of conditions as a ground for termination of Mother's parental rights.

C. A Prior Judicial Finding of Severe Abuse

While the above discussed grounds for termination require the trial court to weigh each piece of evidence, the ground set out in Tenn. Code Ann. § 36-1-113(g)(4) is established by simply entering a prior court ruling into the record. That ground is stated as follows:

The parent or guardian has been found to have committed severe child abuse as defined in § 37-1-102, under any prior order of a court or is found by the court hearing the petition to terminate parental rights or the petition for adoption to have committed severe child abuse against the child who is the subject of the petition or against any sibling or half-sibling of such child, or any other child residing temporarily or permanently in the home of such parent or guardian

In its prior adjudicatory order, the trial court found that Mother had committed severe child abuse against D.P.M., her daughter. Mother chose not to appeal this order and it became final, thus furnishing a ground for terminating the parental rights of Mother to all her children. At the termination hearing, Mother presented evidence challenging the factual predicate behind the prior finding of severe child abuse. However, it was too late for Mother to attempt to relitigate that issue or to otherwise overcome the conclusive effect of the final court order. We hold that this ground was proved by the required quantum of proof.

IV. THE QUESTION OF BEST INTEREST

Once any single ground for termination has been proved, the court must then turn to the question of best interest. The issue for us is whether DCS sustained its burden of proving by clear and convincing evidence that termination of Mother's parental rights to the three child involved was

in those children's best interest.¹¹ *In re Valentine*, 79 S.W.3d at 546; *White v. Moody*, 171 S.W.3d 187, 193-194 (Tenn. Ct. App. 2004). Ascertaining a child's best interest in a termination of parental rights case is a fact-intensive inquiry. *In re Audrey S. & Victoria L.*, 182 S.W.3d 838, 878 (Tenn. Ct. App. 2005).

Consequently, courts must examine the circumstances of each child and make the determination, as defined in the statute, of whether "termination of the parent's rights . . . is in the best interests of the child[ren]." Tenn. Code Ann. § 36-1-113(c)(2). Because denial of a petition to terminate parental rights does not in and of itself affect the custody of a child, *In re Valentine*, 79 S.W.3d at 550, the court's task is not to choose between two home situations. Instead, the inquiry should address itself to the impact on the child of a decision that has the legal effect of reducing the parent to the role of a complete stranger.¹²

While the parent's rights are the focus in the grounds stage, the best interest of the child becomes the paramount consideration after the court has determined that at least one ground has been proved by clear and convincing evidence. *In re Audrey S. & Victoria L.*, 182 S.W.3d at 876. Although some evidence may be relevant to both grounds and best interest, different considerations apply to the two requirements. One important distinction is that grounds are generally established on the basis of the parent's past actions. Best interest, by its nature, must focus on the current situation and, to some extent, is based on a prediction of future events.

The General Assembly has set out a non-exhaustive list of factors for courts to consider when making a best interest determination:

In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

(2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

¹¹While the trial court terminated Mother's rights to three of her children, most of the evidence regarding the parent child relationship involved only D.P.M., the oldest.

¹²A parent whose rights are terminated has "no right thereafter to have any relationship, legal or otherwise, with the child." Tenn. Code Ann. § 36-1-113(l)(1).

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i).

The trial court in this case applied the above factors when making its ruling and discussed them in some detail. Its findings of fact, contained in the Final Decree of Guardianship, included acknowledgments that Mother “has visited the children and has done a very good job of attending visits with the children,” that she had substantially complied with the provisions of the permanency plans, and that she had a meaningful relationship with D.P.M. There was no indication in the court’s findings or in the record that Mother suffered from an alcohol or drug problem.

However, the court ultimately found that termination was in the best interest of the children for the most part because of the failure of Mother to make lasting adjustments in her circumstances, the prior finding of abuse, and the danger that such abuse could be repeated. The court also found that Mother had not paid child support consistent with the guidelines.

The nine non-exclusive factors were designed to help the court connect the past behavior of the parents and the current circumstances of both parents and children with future possibilities. Although the statute is a useful analytical tool, this court has noted that:

Ascertaining a child's best interests does not call for a rote examination of each of Tenn. Code Ann. § 36-1-113(i)'s nine factors and then a determination of whether the sum of the factors tips in favor of or against the parent. The relevancy and weight to be given each factor depends on the unique facts of each case. Thus, depending upon the circumstances of a particular child and a particular parent, the consideration of one factor may very well dictate the outcome of the analysis.

White v. Moody, 171 S.W.3d at 194. Additionally, as the statute makes clear, the listed factors are not exclusive, and the court should consider any other factors relevant to determining the child’s best interest.

One of the most important factors in this case is the existing relationship between D.P.M. and Mother. Both of the expert witnesses in this case testified as to the strength of this bond, with Dr. Kemp even saying it would be beneficial for D.P.M. to maintain contact with Mother as long as the children were in foster care.

While both experts were in agreement as to the relationship between D.P.M. and Mother, they reached different conclusions as to whether it was in the best interest of the children for Mother's rights to be terminated. As this court said in *White v. Moody*, 171 S.W.3d at 193, "What is best for children depends on values and norms upon which reasonable persons can differ."

While dealing with this family, Dr. Kemp came to recognize the problems inherent in cultural and language differences and recommended that Mother be seen by a Spanish-speaking therapist, a recommendation that resulted in the involvement of Dr. Cardona. As we stated above, after numerous sessions with Mother and child, Dr. Cardona affirmed the importance of the parental relationship to D.P.M. and testified that it was in the child's best interest to be reunited with Mother.

Despite the difficulties resulting from the cultural and linguistic differences between Mother and the caseworkers, Mother made consistent efforts to comply with DCS requirements in order to maintain the relationship with her children. While working at a full-time job, Mother completed every class DCS set up for her, furnishing her own interpreter so she could understand what was being taught. She was present for supervised visitation with the children whenever and wherever it was scheduled. And she attended every counseling session with Dr. Cardona, although each session involved a round trip of about 120 miles between Macon County and Nashville.

When we consider D.P.M.'s frequently expressed desire for family reunification, Mother's determination to remain connected with her children, and Dr. Cardona's opinion as to the importance to D.P.M. of the family connection, we do not find clear and convincing evidence that termination of Mother's parental rights would be in the children's best interests. We therefore reverse the judgment of the trial court.

Our decision does not change the current custody arrangement for the children. *See In re Valentine*, 79 S.W.3d at 550. The children are in the custody of DCS which has placed them in the same foster home. Nothing in our decision changes that arrangement.

VI.

The judgment of the trial court is reversed. We remand this case to the Juvenile Court of Macon County for any further proceedings necessary. The costs on appeal are taxed to the appellee, the State of Tennessee Department of Children's Services.

PATRICIA J. COTTRELL, JUDGE